Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
	)	
Qwest Communications International, Inc.	)	WC Docket No. 02-89
	)	
Petition for Declaratory Ruling On the	)	
Scope of the Duty to File and Obtain	)	
Prior Approval of Negotiated Contractual	)	
Arrangements Under Section 252(a)(1)	)	

COMMENTS OF MPOWER COMMUNICATIONS CORP. ON QWEST PETITION FOR DECLARATORY RULING

MPOWER COMMUNICATIONS CORP.

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Summary

The 1996 Act established the requirement that ILECs provide wholesale services to CLECs and outlined the minimum standards for interconnection. One of those requirements was that the agreements establishing interconnection and thereby, the relationship between ILECs and CLECs, should be filed for approval with the State Commission in each state where the CLEC wishes to develop its business.

Mpower supports constructive efforts to develop voluntary, wholesale contract arrangements between ILECs and CLECs but only separate and apart from the UNE "safety net" established pursuant to the 1996 Act. Mpower believes the Qwest effort to dismember the provisions of an interconnection agreement and to treat portions differently undercuts the UNE "safety net" and should not be adopted by the FCC.

Instead, Mpower would urge the FCC to institute the rulemaking requested in Mpower's "FLEX Contract" Petition so that appropriate rules can be established to encourage voluntary, wholesale contracting while preventing abuse of such a process. Mpower's proposal would allow for voluntary wholesale contracts not subject to "pick and choose." In these "FLEX Contracts," ILECs and CLECs could determine their own mutually advantageous wholesale business arrangements, if they preferred them to utilizing the UNE provisions of the 1996 Act. Thus, a CLEC would have a choice between negotiating a FLEX contract or, alternatively, purchasing UNEs pursuant to the terms of an interconnection agreement.

Unlike Qwest's call for private, unfiled and non-public agreements, however, Mpower envisions that FLEX contracts would be publicly available – perhaps on websites – and available for "opt-in" by other similarly situated CLECs. Such an

approach could assist in developing more normal wholesale relationships and with them, the enhancement of intra-modal competition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Qwest Communications International, Inc.	)	WC Docket No. 02-89
Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)	)	

COMMENTS OF
MPOWER COMMUNICATIONS CORP.
ON QWEST PETITON
FOR DECLARATORY RULING

Mpower Communications Corp. ("Mpower") hereby submits its Comments on the issues raised by the Qwest Communications International Inc. ("Qwest") Petition for Declaratory Ruling ("Petition"), pursuant to the Federal Communications Commission ("Commission" or "FCC") Public Notice released April 29, 2002.

I. Introduction

Qwest has petitioned the Commission for a ruling on what negotiated contracts between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") need to be filed and approved pursuant to the provisions of 47 U.S.C. 252(a)(1) of the Telecommunications Act of 1996 ("1996 Act"). In its Petition, Qwest tries to separate the elements which it views as essential to interconnection agreements from "normal unregulated business dealings between CLECs and ILECs." (Petition, p. 9)

Mpower has filed numerous comments suggesting the possible efficacy of ILECs' focusing on the development of such "normal" wholesale business dealings. While Mpower is not aware of the general existence of such relationships, it believes that now is the time to develop or enhance such relationships but not at the expense of the interconnection agreement requirements provided for by the 1996 Act.

The 1996 Act established the requirement that ILECs provide wholesale services to CLECs and outlined the minimum standards for interconnection. One of those requirements was that the agreements establishing interconnection and, thereby, the relationship between ILECs and CLECs, should be filed for approval with the State Commission in each state where the CLEC wishes to develop its business.

Mpower supports constructive efforts to develop voluntary, wholesale contract arrangements between ILECs and CLECs but only separate and apart from the UNE "safety net" established pursuant to the 1996 Act. Mpower believes the Qwest effort to dismember the provisions of an interconnection agreement and to treat portions differently undercuts the UNE "safety net" and should not be adopted. Instead, Mpower would urge the FCC to institute the rulemaking requested in Mpower's "FLEX Contract" Petition[1] so that appropriate rules can be established to encourage voluntary, wholesale contracting while preventing abuse of such a process.

II. Context

The 1996 Act was drafted with the intent of developing a more competitive environment for local service, similar to the results of Judge Greene's Order and the break-up of AT&T on long distance service. The 1996 Act contains the fundamental

[1] Mpower filed its *Petition for Forbearance and Rulemaking* with the FCC, CC Doc. 01-117, on 5/25/01, outlining its request for approval of "FLEX Contracts."

requirements for the structuring and development of a wholesale market for local service. Prior to the 1996 Act, there were no requirements, no rules and no broad-scale wholesale relationships between ILECs and CLECs. In fact, there were few, if any, CLECs.

The 1996 Act provides at 47 U.S.C. 252(a)(1) that:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 [requiring interconnection], the incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier….The agreement…shall be submitted to the State commission under subsection (e) of this section. (Emphasis added.)

47 U.S.C. 252(e)(1) states that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. (Emphasis added.)

The language of the statute appears clear in requiring that the interconnection agreement or agreements negotiated to establish a wholesale relationship pursuant to 47 U.S.C. 251 and 252 shall be submitted to the appropriate State Commission for approval. There is no language which states or implies that portions of the agreement can be treated in some other manner.

III. Approval Requirements and Process

Pursuant to 47 U.S.C. 252(e)(2), the grounds the State Commissions may use for rejection of an interconnection agreement are two-fold: i) the agreement discriminates against a carrier not a party to the agreement or ii) implementation of the agreement is not in the public interest. These are important but very broad criteria. Such criteria do not lend themselves to micromanaging the relationships but to establishing uniformity of opportunity.

Further, despite the implication that State Commission approvals always take at least 90 days and that the contracting parties are precluded from moving forward for

months, the statute does not provide that 90 days must elapse before contracts can become effective. Instead, 47 U.S.C. 252(e)(4) provides that: "If the State commission does not act to approve or reject the agreement within 90 days…the agreement shall be deemed approved." In fact, the "pick-and-choose" requirement, which allows any carrier to adopt portions of another interconnection agreement, as well as the multi-jurisdictional nature of the large ILECs, has led to highly standardized interconnection agreements. As a result, the state approval process has become extremely routinized and often takes only 30 to 45 days.

Further, although the statute does not specifically refer to approval of amendments to interconnection agreements, the language quoted above has led to the rather uniform belief that they must be approved as well. Consequently, amendments are routinely filed for approval.

Given the language of the statute, the purpose of its enactment and its usual implementation by the states, Mpower believes the Qwest Petition presents a flawed method of achieving voluntary, wholesale contracts. Their proposed method would undermine the UNE "safety net." Further, the proposal is for a private, rather than a public, process which could easily be abused.

IV. Developing "Normal" ILEC-CLEC Wholesale Relationships

Qwest repeatedly argues that State Commissions should not intrude on "normal" ILEC-CLEC relationships and therefore, agreements reflecting such relationships should not be filed for approval. Mpower has been arguing for more than a year that ILECs and CLECs should be able to move toward a system of voluntary, wholesale contracts. Mpower's proposal, however, is for a new system, separate from but parallel to the UNE

system established by the 1996 Act. Mpower's FLEX contract petition[2] requests a rulemaking to establish a system which would allow for voluntary wholesale contracts not subject to "pick and choose." In these contracts, ILECs and CLECs could determine their own mutually advantageous wholesale business arrangements, including volume and term discounts, minimum purchase agreements, minimum service quality standards, provisioning and repair time frames, etc.

FLEX contracts would in no way replace the UNE system identified in the 1996 Act. That system represents the CLEC "safety net" that cannot be removed until the market becomes competitive. At present, however, UNE pricing only exists on the basis of single UNEs, whereas wholesale arrangements typically provide for bulk transfers and bulk pricing, giving certainty and security to both parties and allowing for more efficient provisioning, performance and pricing arrangements.

Further, unlike Qwest's call for private, unfiled and non-public agreements, Mpower envisioned that FLEX contracts would be publicly available – perhaps on websites – and available for "opt-in" on a non-discriminatory basis by other similarly situated CLECs. Such contractual arrangements might well be developed as "package plans" on the order of the retail cellular service contracts which have served wireless providers so well.

Mpower's plan provides that FLEX contracts not be filed for regulatory approval either with the state commissions or with the FCC. This would lend itself more readily to region-wide agreements. Mpower believes the FCC should provide any needed enforcement but would not generally need to become involved with FLEX contracts unless enforcement was necessary. For such purposes, Mpower suggests the FCC adopt

[2] *Id*.

a procedure such as the "Rocket Docket" for the purpose of any necessary enforcement, including protecting the rights of CLECs to opt into a FLEX contract in its entirety.

Thus, separate and apart from the UNE interconnection process available pursuant to the 1996 Act, under Mpower's FLEX contract proposal, ILECs and CLECs could develop truly voluntary agreements, not subject to "pick and choose." The agreements would be publicly available – probably on a website -- for opt-in by other CLECs on a fair and non-discriminatory basis. These FLEX contracts would not be filed for approval with any state commission nor with the FCC but CLEC rights, including the right to opt into an agreement on a fair and non-discriminatory basis, would be subject to "Rocket Docket" enforcement procedures at the FCC.

Such an approach would supplement the UNE "safety net" and could assist in developing more "normal" wholesale relationships between ILECs and CLECs, as will as enhancing intra-modal competition. The resulting combination of more efficient wholesale relationships and more effective retail competition would benefit ILECs, CLECs and retail customers alike. Mpower encourages the FCC to open a rulemaking, as requested in its FLEX Contract Petition, to develop appropriate rules for "FLEX Contracts" so they can become available for use within a system of rules designed to encourage the use of such voluntary, wholesale contracts while preventing their abuse.

V. Conclusions

The 1996 Act provides for the filing of interconnection agreements for approval by the appropriate State Commissions, not the filing of only portions of interconnection agreements. Adoption of the analysis in Qwest's Petition would undercut the protections of the 1996 Act and should not be adopted by the Commission. Instead, Mpower

encourages the Commission to institute the rulemaking requested in Mpower's FLEX Contract Petition so that appropriate rules can be developed to encourage voluntary wholesale contracting while preventing possible abuses.

Respectfully submitted,

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